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No. 1028

In the

# Supreme Court of the United States

OCTOBER TERM 1961

GEORGE S. ATKINSON *et al.*,

*Petitioners,*

*v.*

CITY OF DALLAS,

*Respondent.*

## PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Because of the character of the Brief submitted by Respondent in opposition to Petitioners' Application for Writ of Certiorari, Petitioners, in fairness to this Court, feel obligated to make reply thereto lest the Court be misled by Respondent's wilful misrepresentation as to what is shown in the record of this case, and the falsity of deductions predicated thereon.

## REPLY TO JURISDICTION AND QUESTION PRESENTED

Respondent, on the authority of *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, and *Arizona v. California*, 283 U. S. 423, contend that no substantial federal question is involved and that this Court is without jurisdiction. The cases cited do not sustain Respondent's position. In the *Arizona* case the Court refused jurisdiction (p. 463) on the ground that "But Wilbur *threatens* no physical interference with these projects." In the *Ashwander* case, the court held: that the facts alleged "did not give rise to justiciable controversy save as they had fruition in action of a definite and concrete character constituting an actual or *threatened* interference with the rights of the persons complaining. The judicial power does not extend to the determination of abstract questions." If the rule of these cases be applied to the instant case, it must be held that a justiciable controversy exists, and the question sought to be determined is not abstract. The Respondent City admits that it is building the runway to use, and as hereinafter demonstrated, such use will cause a "taking" of Petitioners' rights.

As to the "Question presented" by the Respondent, it ignores that portion of the Texas Constitution requiring payment in advance, or a deposit of security where rights of property are "taken".

## REPLY TO RESPONDENT'S STATEMENT OF THE CASE

The truth about the history of Love Field, as opposed to Respondent's statement at page 2 of its Brief, is shown in Respondent's verified Answer to Plaintiffs' Amended Petition (Tr. No. 59027-B, pp. 94, 95). Suffice it to say here that the original airport consisted of 320 acres, that it was operated and enlarged by the United States Government between 1940 and 1946, and that it presently occupies in excess of 1200 acres.

The Court's attention is directed to the verified Plaintiffs' First Amended Original Petition, on the question of the nature of the use of the land near the airport (Tr. No. 59027-B, p. 72) where in 1943 the Respondent's City Planner advised the Council that "Love Field is surrounded by commercial, industrial, and residential developments, and the cost of any extension would be very high if not prohibitive * * *." The statement of the Respondent that "All of Petitioners have purchased their property near the airport since 1947, is wholly false and unsupported by the record.

The Court's attention is directed to the fact that the "three-day evidentiary hearing", referred to by Respondent in its Brief, was a hearing had in connection with Petitioners' Application for a temporary injunction, *based upon their Original Petition which was subsequently abandoned.* The Petitioners have never been granted any evidentiary hearing on the allegations of their Amended Petition.

The Respondent through manipulation of the testimony of George Coker, Director of Aviation for the City of Dallas, attempts to demonstrate that jet planes will rise 1,000 to 2,000 feet in travelling 4,000 feet after takeoff; this statement is in absolute conflict with the testimony given by J. H. Alexander, whose testimony established, as a part of the City's case, that a 707 Boeing Jet would ascend only to a height of 1,150 feet in travelling a distance of 8,100 feet after leaving the ground; and that at a distance of 4,800 feet from the end of the runway it would pass over Rusk Junior High School at a height of 1,100 feet above the school; the same witness testified that the same type of plane, at a distance of 4,800 feet from the end of the runway would approach for landing at a height of 250' above said school.

For the Court's assistance a chart of the testimony relevant to landing and take-off of planes from the proposed runway is hereinafter set forth:

GRAPHIC CHART REFLECTING TESTIMONY AS TO

LANDINGS AND TAKE-OFFS

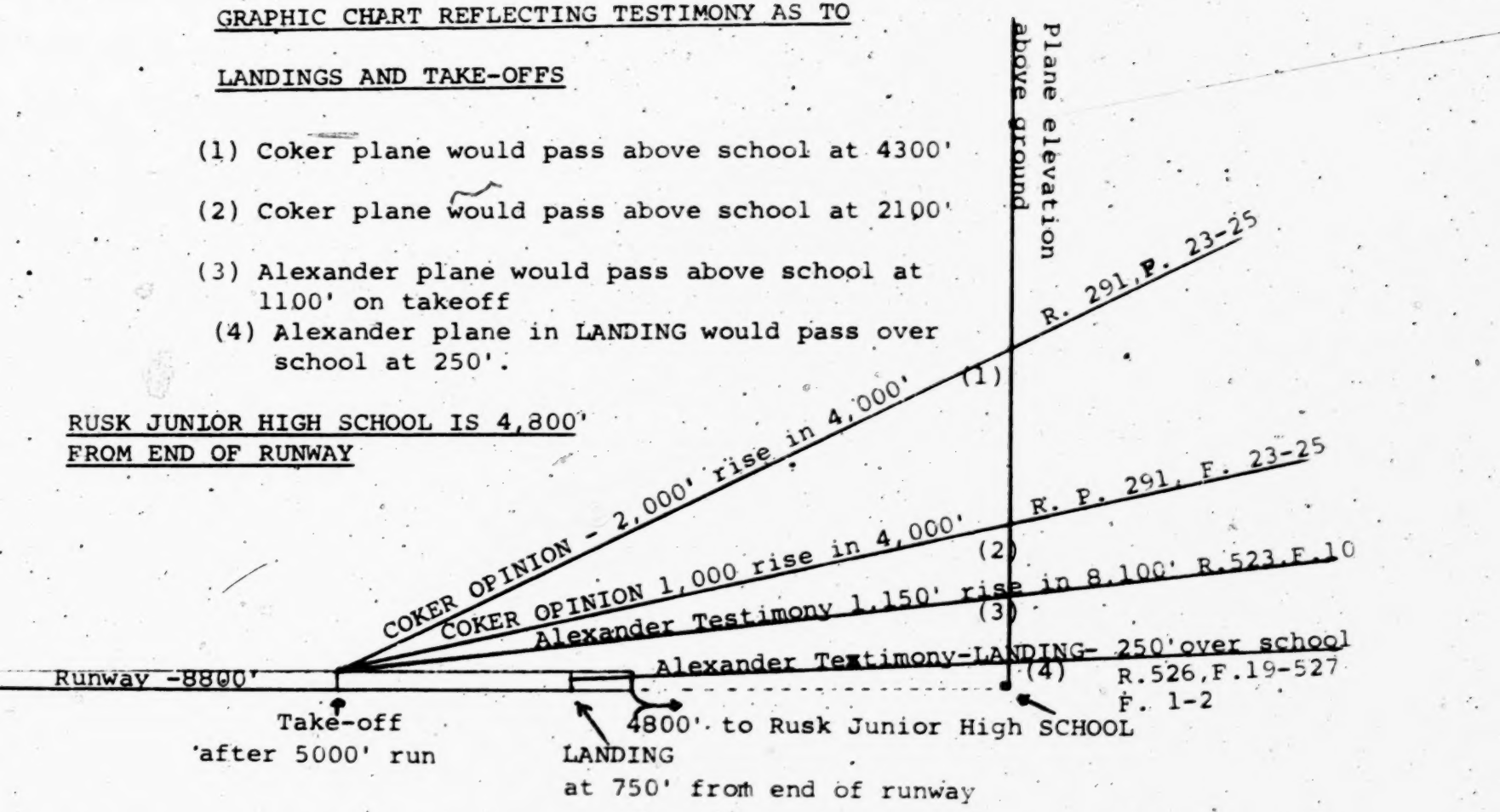
(1) Coker plane would pass above school at 4300'

(2) Coker plane would pass above school at 2100'

(3) Alexander plane would pass above school at 1100' on takeoff

(4) Alexander plane in LANDING would pass over school at 250'.

RUSK JUNIOR HIGH SCHOOL IS 4,800' FROM END OF RUNWAY



The Record shows that Coker's testimony was only an "opinion" by a man without qualifications to express the same; and that the testimony of Alexander, the City's other witness was based upon assumption of the operation of a jet at 60% capacity.

The plea of urgency for construction of the proposed runway, and the Respondent's frustrated discussion of "nuisance" law suits have no relevancy as far as the case at bar is concerned; fourteen judges can be equally wrong, and Respondent's attitude, as expressed in its condemnation of Petitioners' efforts to obtain their constitutional rights, is typical of its dictatorial disregard of the Petitioners' rights established by the Constitutions of the United States and Texas, and the Statutes of Texas.

## PETITIONERS' ANSWER TO RESPONDENT'S CLAIM THAT NO SUBSTANTIAL FEDERAL QUESTION IS RAISED BY THE PETITION

This Point of the Respondent attempts to dispose of Petitioners claim by demonstrating that planes will not cross over Petitioners' property until "more than one mile after take off and at a height in excess of 1000 to 2000 feet." (Brief, p. 4.) Rights are seized in landing as well as in take-off of planes, and the Respondent's own evidence shows that planes will pass over Petitioners' property at heights below 190 feet, the altitude decreasing as the plane nears the runway. Respondent's position is untenable particularly since the

land rises to the northwest of the proposed runway and the height at which planes would pass over some of Petitioners' property would decrease accordingly. Petitioners further submit that they have consistently contended that these matters were disputed matters of fact upon which they were and are entitled to jury trial.

Independent of the testimony offered by Respondent, the record conclusively demonstrates that the flight of planes over Petitioners' homes will result in a "taking". Accepting for the purpose of argument Respondent's statement that Petitioners' property lies from 2200' to 3000' from the end of the runway, the glide angle established by Federal standards would permit the planes to cross Petitioners' property at a height of 40 to 60 feet above the ground or 25 to 45 feet above their homes. Moreover, the homes located 2200 feet from the runway proposed, are within the "clear zone" required by to kept free of obstruction by relevant Federal regulations.

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Petitioners believe that since Respondent has failed to deny the case cited by the Court of Civil Appeals in its opinion *McCammon & Long Lbr. Co. v. T & B Ry. Co.* Petition herein, Apps. A-5, or to distinguish it, and has placed its reliance upon inferior court cases and Texas Supreme Court cases decided prior to those cited by Petitioners in their Petition for Writ of Certiorari, no further answer to Respondent's Brief is necessary.

Since the record discloses a "taking" the law cited by Petitioners is applicable, and they respectfully submit that their Application for Writ of Certiorari should be granted.

Respectfully submitted,

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